

A05-1130

STATE OF MINNESOTA  
IN COURT OF APPEALS

**In the Matter of the Disposition of  
Molly, a German Shorthaired Pointer  
Owned by William Frederick  
Klumpp, Jr.**

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**APPELLANT'S REPLY BRIEF**

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## ARGUMENT

### **I. Molly Did Not “Kill” A Domestic Animal within the Meaning of Minn. Stat. § 347.50, subd. 2(2).**

Respondent agrees that “kill” for purposes of Minn. Stat. § 347.50, subd. 2(2) should be given its common and ordinary meaning. Respondent’s Brief at 8. Although respondent agrees that “kill” in this context means to deprive of life, respondent argues and the lower court found that “kill” means to inflict an injury to another animal whose owner *declines* to have it stabilized or treated and instead *elects* to have it euthanized without any expert veterinary testimonial evidence regarding the seriousness of the injuries or that the injured animal could not have survived. In other words the lower court resolved the issue of statutory interpretation by finding that “kill” means “to be a substantial causal factor in the death,” which is how Minnesota’s appellate courts have interpreted “cause the death of” in the homicide statutes. This definition was in effect rejected when in 1988 the legislature used the word “kill” in Minn. Stat. § 347.50, subd. 2(2) rather than “cause the death of.”

By finding that complainant’s dog “died as a result of the wounds inflicted by Molly” the lower court reached an absurd and unreasonable result in contravention of Minn. Stat. § 645.17(1). The evidence was uncontradicted that the complainant “declined” permission to “begin stabilization” and instead “elected for euthanasia.” T. 99; Exhibit 15. No evidence was admitted “that the complainant was forced to euthanize Scooter” or that “it was necessary to euthanize Scooter” as claimed in Respondent’s Brief

at 9. Respondent's attempt to introduce such unreliable hearsay evidence was objected to and properly sustained by the lower court. T. 28.

Indeed cross-examination revealed that Paul Mertensotto engaged in a "tug of war" with Molly by pulling on his dog's rope while still tied to his dog, T. 27, 30. This may well have strangled Scooter. No necropsy was performed so we will never know to what extent the tug of war contributed to the injuries.

The absurdity and unreasonableness of the interpretation of "kill" asserted by respondent and adopted by the lower court is illustrated by an earlier attack on Molly by neighbor Jim Paulet's dog, PJ. See T. 51, 80-84. Had Bill Klumpp sought medical treatment for the bites inflicted on Molly by PJ and then elected for euthanasia of Molly, respondent would be arguing that PJ "killed" Molly notwithstanding the lack of any expert veterinary testimony regarding Molly's injuries.

This issue is clearly simply one of statutory interpretation which this court reviews de novo. The lower court never explicitly resolved this issue although it was clearly raised in the memoranda filed by appellant. Instead the lower court did so by implication. It is a separate question of fact whether respondent proved Molly killed complainant's dog. However, even the child custody case cited as authority by respondent for the proposition that review of the statutory interpretation issue here is under an abuse of discretion standard, *Maxfield v. Maxfield*, 452 N.W.2d 219 (Minn. 1990), noted, "In such a blend [of questions of mixed law and fact], the appellate court may correct erroneous applications of the law." *Id.* at 221.

The lower court's implied interpretation of "kill" is erroneous and contrary to its common and ordinary meaning because the Mertensotto's dog was alive, and there is no testimony that she would have died but for the decision to euthanize. The lower court's statutory interpretation, and that asserted by respondent, is unreasonable in light of the evidence, and reads to absurd results. Consequently, the decision should be reversed.

## **II. Respondent Lacked the Authority to Enforce the Dangerous Dog Statute.**

Respondent wrongly identifies the provisions of Minn. Stat. § 347.53 as authority for a city "to regulate dangerous dogs." Respondent's Brief at 11. Minn. Stat. § 347.53 pertains only to a "potentially dangerous dog" as defined in Minn. Stat. § 347.50, subd. 3. The definition of a "potentially dangerous dog" is separate and apart from the definition of a "dangerous dog" in Minn. Stat. § 347.50, subd. 2. Respondent proceeded against Molly as a "dangerous dog" and not as a "potentially dangerous dog." The only consequence of an animal being designated a "potentially dangerous dog" is that it must have a microchip implanted. Minn. Stat. § 347.515. While Minn. Stat. § 347.53 permits local jurisdictions to impose additional requirements on the owners of potentially dangerous dogs, the City of Arden Hills enacted no such provisions.

Neither *Park v. City of Duluth*, 134 Minn. 129, 159 N.W. 627 (1916) nor *City of St. Paul v. Whidby*, 295 Minn. 129, 203 N.W.2d 823 (1972), cited by respondent, stands for the proposition that a due process is satisfied where a city enforces a state statute when neither the statute nor any enforcement process has been adopted by the city. *Whidby* held that a person prosecuted under a criminal city ordinance was entitled to the

presumption of innocence. Citing *Park*, the court in *Whidby* noted that acts prohibited by an ordinance adopted by a city in its legislative capacity rather than by state criminal statutes are no less criminal in nature. *Id.* 203 N.W.2d at 827.

Respondent could have adopted the state dangerous dog statute by reference pursuant to Minn. Stat. § 471.62 but it did not. Respondent could have adopted a process to designate a dog as a “dangerous dog” consistent with constitutional due process but it did not. Respondent should not now be allowed by the arbitrary decision of its city attorney to enforce the state statute by the means of the city attorney’s choosing contrary to Minn. Gen. Prac. R. 116.

Nor does *State v. Dailey*, 284 Minn. 212, 169 N.W.2d 746 (1969), support respondent’s actions. *Dailey* simply held that a city ordinance prohibiting prostitution as a misdemeanor was not preempted by a state statute making prostitution a gross misdemeanor in the absence of a preemption clause. Appellant’s position is that where respondent has adopted a specific ordinance to regulate dangerous or vicious dogs, respondent should not be permitted to proceed under the state dangerous dog statute where the state statute has no provision for a process whereby a dog can be designated as dangerous and the respondent has not adopted any ordinance providing for such a process.

Appellant’s due process argument is that constitutional due process requires not only a hearing but notice of the enforcement process to be utilized in the statute or ordinance prior to the acts complained of in the enforcement action. Respondent’s position is akin to enacting a criminal law and then making up the enforcement process

after the crime is committed even though a procedural rule specifically prohibits that enforcement process. Respondent cites no authority to support such a position.

Attempting to salvage its process, respondent wrongly claims on pages 3, 14 and 15 of its brief that Bill Klumpp or his counsel agreed that an order to show cause was an appropriate process for designating Molly as a dangerous dog pursuant to Minn. Stat. § 347.50, subd. 2(2). T. 6. There is no such evidence in the record and respondent's claim is contradicted by the record. T. 4-7. Counsel for Bill Klumpp stated:

We don't agree that the City is properly proceeding under the statute. As we wrote in our brief, we believe that the City's ordinance should provide its sole option in this matter.

T. 6.

The only agreement was that constitutional due process required a hearing and that the hearing before the lower court was not a hearing akin to a hearing before the issuance of a temporary restraining order but rather would be the final disposition in the lower court. *Id.*

Minn. Gen. R. Prac. 116 is absolutely clear on its face that the disfavored order to show cause will be issued only if authorized by statute or a rule of civil procedure or where the court finds it necessary to require the party to appear in person. Respondent cites no statute or procedural rule to justify its arbitrary choice to proceed by an order to show cause. Nor is there anything in the record to support a finding that the lower court found it necessary for Bill Klumpp to appear in person.

By proceeding under an order to show cause respondent deprived Bill Klumpp of an opportunity to try to resolve the matter through mediation. This Court must give

meaning to Minn. Gen. R. Prac. 116 by precluding respondent from benefiting from respondent's violation of the rule. If the process by which Molly was designated a dangerous dog was in violation of the rules, the designation should be reversed and the matter dismissed where, as here, the statute itself provides for no process by which a dog may be so designated and respondent has not adopted any such designation process by ordinance. Respondent's action was arbitrary, capricious and unauthorized by any rule, ordinance or statute.

Respondent is also wrong about the remedies available to the lower court had respondent taken an action authorized by law and proceeded under Arden Hills Ord. 410.06. App. 57-8. After service of process, a hearing and sufficient evidence the lower court under that ordinance, could have ordered Molly "confined to a designated place" while in Arden Hills such as a fenced in yard, or kept on a leash under the control of a responsible person, which the Klumpps had already done. Arden Hills Ord. 410.06, subd. 2; T. 69-70. The lower court also would have had the option under the ordinance of ordering the Klumpps to remove Molly from the city, which the Klumpps were in the process of doing and have now done. Arden Hills Ord. 410.06, subd. 2; T. 93; App. 61-4. On the facts here appellant is confident no court would have ordered the destruction of Molly.

Likewise, respondent misleads the court by stating that a proceeding under Arden Hills Ord. 410.06 had "more severe consequences" than having Molly designated a dangerous dog under state statute. As a dangerous dog Molly cannot hunt because she must be kept in a "proper enclosure" or muzzled while on a leash anywhere in Minnesota.

Minn. Stat. § 347.52(a). In addition the Klumpps must maintain a liability policy or post a surety bond in the amount of \$50,000, payable to anyone injured by Molly. Minn. Stat. § 347.51, subd. 2(2). Bill Klumpp must pay an annual registration fee adopted by the county of up to \$500 in addition to any other licensing fees. Minn. Stat. § 347.51, subd. 2(3). Lastly, Bill Klumpp could have been ordered to have Molly spayed and have a microchip implanted had those two things not already been done. Minn. Stat. §§ 347.515; 347.52(d).

### **III. The Lower Court Clearly Abused Its Discretion in Finding Molly's Actions Were Unprovoked.**

Neither authority cited by respondent on the issue of provocation applies to the provocation under the dangerous dog statute, Minn. Stat. § 347.50, subd. 2. *Bailey by Bailey v. Morris*, 323 N.W.2d 785 (Minn. 1982), was decided under Minn. Stat. § 347.22 which provides for liability for damages caused by a dog biting a person. Likewise, *Fake v. Addicks*, 45 Minn. 37, 47 N.W. 450 (1890), dealt with common law liability for damages cause by a dog bite where the dog was “accustomed to bite mankind, and kept and owned by defendant with knowledge of his vicious propensities.” *Id.* at 37, 47 N.W. at 450. Notably, *Fake* cites *Smith v. Pelah*, 2 Strange, 1264, which sets forth what many call the “one bite rule,” under which common law liability did not attach until after notice of the first bite.

*Bailey* noted that the statutory defense of provocation relates only to the plaintiff's conduct with respect to the dog and that there was no evidence or claim of provocation

other than the minor plaintiff stepping forward and extending her hand towards the dog. Id. at 787.

In the instant case there was evidence of a number of acts and circumstances constituting provocation. Complainant's dog in the weeks before October 24 had come in the Klumpps' yard and barked and snarled at Molly just outside of Molly's kennel. T. 61. On one other occasion in the weeks before October 24 complainant's dog had come into appellant's yard while Molly's kennel was empty and defecated in Molly's kennel. Id. There were other times when complainant's dog had come into the Klumpps' yard and had to be chased back into Mertensottos' yard. T. 93. There were other occasions when Sharon Klumpp had heard barking and later heard Bill Klumpp comment that complainant's dog had been on the Klumpps' property. Id. The lower court precluded appellant from introducing other evidence of provocative behavior of complainant's dog toward Molly in the two years before October 24. T. 60. Complainant's dog was generally aggressive and unsocialized. T. 87. This was in direct contrast to Klumpps', two neighbors' and a friend's description of Molly. T. 48, 76-8, 80-2, 86-7, 89. On October 24 complainant's dog was barking at Molly and had advanced as close to Molly as the rope would allow. T. 21-2. It was not just a simple bark as alleged in Respondent's Brief at 15. Dogs communicate and provoke by barking, snarling and growling.

Molly's dermatologist at the University of Minnesota Veterinary Hospital had prescribed Prednisone for Molly, which she was taking due to a flare up in Molly's allergy to mold. T. 62; Exhibit 7. One of Prednisone's side effects is that some animals

may become aggressive. Id.; App. 40-4. Thus, Molly's medication provided provocation. Likewise, the loud noise made by the leaf blower frightened and provoked Molly. T. 52.

Minn. Stat. § 347.50, subd. 2(2), does not limit evidence of provocation to the day of the injury or to acts by the injured animal alone. Clearly, the owner of the injured animal can commit acts constituting provocation. Here complaint's husband engaging in a tug of war with Molly could be seen as provocation.

Respondent completely misinterprets the facts of an encounter between Molly and neighbor Jim Paulet's dog, PJ. The facts were uncontradicted that PJ broke loose by pulling his tie out stake out of the ground in Paulet's front yard and attacked and bit Molly, who was being walked on her leash in the street. T. 51, 80-4. Even though Molly was bitten by PJ who was "snarling and growling" and acting "pretty wild," PJ only ended up with wet fur from Molly's defending herself against PJ's aggression. T. 51, 81-2. Based on that experience Jim Paulet had no reason to regard Molly as dangerous to people or other animals, even when attacked. T. 82. Jim Paulet had no concerns about Molly being in the neighborhood or his daughter being with Molly in the Klumpps' home. T. 80, 82. This incident clearly shows that Molly is simply not a dog that, in ordinary circumstances, poses any danger to other dogs, much less to people.

"Findings of fact are clearly erroneous only if the reviewing court is 'left with the definite and firm conviction that a mistake has been made.'" *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). This court should correct the mistake of the lower court based on the evidence summarized above.

**RELIEF**

This court should grant the relief requested in Appellant's Brief at 26.

**LINDQUIST & VENNUM P.L.L.P.**

Dated: September 23, 2005

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